SUPERINTENDENT OF LAND AND SURVEYS, BAHAGIAN MUKAH & ANOR v. BUNYAK GADIN & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
ROHANA YUSUF JCA
PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEALS NO: Q-01-353-09-2014 & Q-01-370-09-2014]
22 MARCH 2016

NATIVE LAW AND CUSTOM: *Land dispute – Division of area – Claim for native customary rights ('NCR') within part of provisional lease granted by State Land Authority – Whether NCR proven – Whether NCR land to be excised from provisional lease*

CIVIL PROCEDURE: *Injunction – Prohibitory and mandatory injunctions – Whether injunction could lie against Government or Government department against carrying out public duties – Government Proceedings Act 1956, s. 29 – Specific Relief Act 1950, s. 54*

The first defendant, the Superintendent of Lands and Surveys Bahagian Mukah, with the knowledge and authority of the second defendant, the State Government of Sarawak, issued a provisional lease ('PL Lot 24') to the third defendant, Delta-Pelita Sebakong Sdn Bhd. The plaintiffs, who were of Iban race commenced a representative action claiming that native customary rights ('NCR') measuring 107.8331 hectares had been included in the PL Lot 24 and thus pleaded trespass on the plaintiffs' NCR located within PL Lot 24. The plaintiffs sought various reliefs and orders from the court, *inter alia*, a declaration that the plaintiffs had acquired and/or inherited NCR over the area claimed by the plaintiffs and that PL Lot 24 was unlawful, improper, unconstitutional and therefore null and void. The plaintiffs demanded that the area measuring 107.8331 hectares be excised out of the area under the PL Lot 24 and also claimed for specific damages, loss of profit, exemplary or aggravated damages and costs. The Judicial Commissioner ('JC') found that the defendants had not rebutted the plaintiffs' claim and that on a balance of probabilities, the plaintiffs' NCR land, totalling 107.8331 hectares, was within the PL Lot 24 granted to the third defendant. Hence, the appeals herein by the defendants: (i) Appeal No 353 by the first and second defendants against the granting of the declarations in paras (h) and (i) of the plaintiffs' claim and the granting of the prohibitory injunction and mandatory injunction prayed for by the plaintiffs in paras (j) and (k) of the statement of claim; and (ii) Appeal No 370 by the third defendant against the whole of the decision of the JC.

Held (allowing Appeal No 353 in part; allowing Appeal No 370 appeal in part)

Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

(1) The finding that the 107.8331 hectares of NCR land claimed by the plaintiffs were within the provisional lease for Lot 24 was affirmed. The 107.8331 hectares of NCR land were to be surveyed to identify its exact location and size and be excised from the provisional lease. The remaining land under the provisional lease which were not affected by the NCR land would be intact and the third defendant could continue to have quiet and peaceful enjoyment of the provisional lease. (para 15)

(2) Pursuant to s. 29 of the Government Proceedings Act 1956 and s. 54 of the Specific Relief Act 1950, an injunction cannot lie against the Government or a Government department to stop them from carrying out their public duties. Accordingly, the High Court order granting the prohibitory and mandatory injunctions against the first and second defendants was set aside. (paras 16 & 17)

(3) For Appeal No 370, the order for the special damages to be assessed was set aside as the plaintiffs had not proven it. However, there was no merit in the defendants' argument on the issue of *locus standi* of the plaintiffs to bring a class action or representative action. The JC had the advantage of seeing and hearing the witnesses and was thus in a better position to evaluate the truthfulness of the testimonies of the witnesses. The JC had meticulously considered the connection of all the natives' witnesses to the NCR land which they claimed to be their NCR. Therefore, the finding of fact by the JC of the connection of the natives' witnesses was sufficient to give the plaintiffs *locus standi* to bring the action. (paras 18 - 20)

Bahasa Malaysia *Headnotes*

Defendan pertama, Pengarah Tanah dan Survei, Bahagian Mukah, dengan pengetahuan dan kuasa defendan kedua, Kerajaan Negeri Sarawak, mengeluarkan pajakan sementara ('PL Lot 24') kepada defendan ketiga, Delta-Pelita Sebakong Sdn Bhd. Plaintif-plaintif, suku kaum Iban, memulakan tindakan berperwakilan menuntut hak adat orang asal ('NCR') seluas 107.8331 hektar yang disertakan dalam PL Lot 24 dan oleh itu menuntut pencerobohan atas NCR plaintif-plaintif yang terletak dalam PL Lot 24. Plaintif-plaintif memohon pelbagai relif dan perintah dari mahkamah, antara lain, deklarasi bahawa plaintif-plaintif telah memperoleh dan/atau mewarisi NCR atas kawasan yang dituntut plaintif-plaintif dan bahawa PL Lot 24 tidak sah, tidak wajar, tidak berperlembagaan dan oleh itu terbatal dan tidak sah. Plaintif-plaintif menuntut bahawa kawasan seluas 107.8331 hektar dikeluarkan dari kawasan di bawah PL Lot 24 dan juga

menuntut ganti rugi spesifik, kehilangan keuntungan, ganti rugi teladan dan tambahan serta kos. Pesuruhjaya Kehakiman ('PK') mendapati bahawa defendan-defendan gagal mematahkan tuntutan plaintif-plaintif dan atas imbangan kebarangkalian, tanah NCR plaintif-plaintif, seluas 107.8331 hektar, terangkum dalam PL Lot 24 yang diberikan kepada defendan ketiga. Oleh itu, rayuan-rayuan oleh defendan-defendan: (i) Rayuan No 353 oleh defendan pertama dan kedua terhadap pemberian deklarasi dalam perenggan (h) dan (i) tuntutan plaintif dan pemberian injunksi larangan dan mandatori yang dipohon oleh plaintif-plaintif dalam perenggan (j) dan (k) pernyataan tuntutan; dan (ii) Rayuan No 370 oleh defendan ketiga terhadap keseluruhan keputusan PK.

Diputuskan (membenarkan sebahagian Rayuan No 353; membenarkan sebahagian Rayuan No 370)
Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:

(1) Dapatan bahawa 107.8331 hektar tanah NCR yang dituntut oleh plaintif-plaintif terangkum dalam pajakan sementara bagi Lot 24 disahkan. Tanah NCR yang meliputi 107.8331 hektar diarahkan diukur untuk mengenal pasti lokasi sebenar dan saiz dan dipotong daripada pajakan sementera tersebut. Baki tanah di bawah pajakan sementara tersebut yang tidak terjejas oleh tanah NCR akan kekal dan defendan ketiga boleh meneruskan dengan penggunaan pajakan sementara tersebut tanpa gangguan.

(2) Menurut s. 29 Akta Prosiding Kerajaan 1956 dan s. 54 Akta Relif Spesifik 1950, injunksi tidak boleh diberikan terhadap Kerajaan atau jabatan Kerajaan untuk menghalang mereka daripada menjalankan kewajipan umum. Dengan itu, perintah Mahkamah Tinggi yang telah memberikan injunksi-injunksi larangan dan mandatori terhadap defendan pertama dan kedua diketepikan.

(3) Bagi rayuan 370, perintah bagi pentaksiran ganti rugi khas diketepikan kerana plaintif-plaintif tidak membuktikannya. Walau bagaimanapun, tiada merit dalam hujahan defendan-defendan berkaitan isu *locus standi* plaintif-plaintif untuk membawa tindakan berkumpulan atau berperwakilan. PK mempunyai kelebihan melihat dan mendengar saksi-saksi dan oleh itu dalam kedudukan yang lebih baik untuk menilai kebenaran keterangan saksi-saksi. Pesuruhjaya Kehakiman telah mempertimbangkan secara teliti kaitan kesemua saksi-saksi orang asal bagi tanah NCR yang menuntut NCR mereka. Oleh itu, dapatan fakta PK berkenaan dengan kaitan saksi-saksi orang asal adalah mencukupi untuk memberikan plaintif-plaintif *locus standi* untuk membawa tindakan tersebut.

Case(s) referred to:

Government Of The State Of Negeri Sembilan v. Yap Chong Lan & Ors And Another Case [1984] 2 CLJ 150; [1984] 1 CLJ (Rep) 144 FC ***(refd)***

Superintendent of Lands and Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd [2009] 6 CLJ 751 CA ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, s. 29
Land Code (Sarawak) (Cap 81), s. 28(3), (4)
Specific Relief Act 1950, s. 54(d)

For the appellants - Dayang Jamillah Tun Salahuddin; AG's Chambers, Sarawak
For the respondents - Peli Aron; M/s Peli Aron

[Editor's note: Appeal from High Court Sibu; Suit No: 21-3-2009 (overruled in part).]

Reported by S Barathi

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

[1] These two appeals are related and we heard them together on 20 August 2015. In respect of Appeal No. 353 the appeal is by the first defendant below - the Superintendent of Land and Surveys Bahagian Mukah and by the second defendant - the State Government of Sarawak. The appeal was against the order of the learned Judicial Commissioner (JC) granting prayer (h) and (i) of the plaintiffs' claim whereby the plaintiffs sought certain declaration; and also against the granting of prohibitory injunction and mandatory injunction in prayers (j) and (k) respectively of the plaintiffs' statement of claim against the first and second defendants. Our decision in respect of this appeal is unanimous in that we allowed the first and second defendants' appeal in respect of prayers (h), (j) and (k). We unanimously dismissed the appeal against prayer (i). Accordingly, we ordered that the prohibitory and mandatory injunction be set aside and the NCR land totalling 107.8331 hectares be taken out from the provisional lease Lot 24 granted to the third defendant; and for this purpose we directed that a survey be conducted to determine and identify the exact area and size of the NCR land within the provisional lease Lot 24 and the survey is to be conducted at the expense of the Superintendent of Land and Survey Bahagian Mukah. We made no order as to costs in this appeal.

[2] In respect of Appeal No. 370, the appeal is by Delta Pelita Sebakong Sdn Bhd (Company No. 358162-D) third defendant in the court below against the decision of the learned JC allowing the plaintiffs' claim for NCR over 107.8311 hectares of land within the Plots C and D in the provisional lease granted to the third defendant by the first defendant with the approval of the second defendant. In this appeal our decision is also unanimous. We allowed the appeal in part in that the High Court order for special damages to be assessed is set aside because the plaintiffs have not proven their special

damages. The rest of the orders of the High Court are affirmed subject only to our orders and decision in Appeal No. 353 above. Parties are given liberty to apply. We also ordered no costs for this appeal with the deposit is to be refunded to the appellants.

[3] We pronounced our decision on these two appeals on the same day. The following are the reasons for our decision.

[4] The respondents in these two appeals are the same plaintiffs in the court below. These two appeals arose from the same decision made by the learned JC on 14 August 2014. The appellants and the respondents in these two appeals shall be referred to as they were before the learned JC below.

The Background Facts

[5] The background facts to these two appeals are summarised from the facts found by the learned JC in his grounds of judgment.

> The Plaintiffs in this case are all Iban by race. They commenced this representative action on behalf of themselves and 21 other families, or bilek proprietors, occupiers, holder and claimants of the Native Customary Rights Land situated at Sungai Baoh Chelum and Sungai Semaram, which are tributaries of Sungai Baoh which flows into Sungai Batang Oya ("the Plaintiffs' NCR").
>
> The general location of the Plaintiffs' NCR land are shown on 2 maps or plans marked as Plan B1 and Plan B2 and the location is also shown in Exhibit P20 which is a Topographical 1:50,000 Map of Stapang.
>
> On 16th May 2001, the 1st Defendant with the knowledge and authority of the 2nd Defendant issued a provisional lease described as Provisional Lease Lot 24 Mukah Land District ("PL Lot 24") to the 3rd Defendant.
>
> When the said PL Lot 24 was issued to the 3rd Defendant, the Plaintiffs claim that their NCR measuring of 107.8331 (one hundred seven point eight three three one) hectares have been included in the said PL Lot 24. Hence, the Plaintiff pleaded that the 3rd, 4th and 5th Defendants had trespassed on the Plaintiffs' NCR located within the said PL Lot 24 by cutting, clearing fruit trees crops and damaging the land.
>
> The Plaintiffs also averred that the PL Lot 24 was issued to the 3rd Defendant without proper investigation. The 1st Defendant had failed, refused and/or neglected to do physical ground survey and as a result the Plaintiffs' NCR measuring of 107.8331 hectares was included in the said PL Lot 24 which caused the 3rd, 4th and 5th Defendants to trespass and caused damaged and loss to the Plaintiffs.
>
> Hence, the Plaintiffs come to this Court seeking various reliefs and orders amongst others declaration that the Plaintiffs had acquired and/or inherited NCR over the area claimed by the Plaintiffs as shown in Plan B1 and B2, that this NCR precludes any of the Defendants from impairing or abridging the Plaintiffs' rights over the said land, and most importantly, a declaration that the PL Lot 24 is unlawful, improper, unconstitutional and therefore null and void. The Plaintiffs also demand that the area

measuring of 107.8331 hectares included in the said PL Lot 24 be excised out of the area under the PL Lot 24. Plaintiffs further claims for specific damages, loss of profit, exemplary or aggravated damages and costs.

[6] In their claim the plaintiffs sought the following reliefs:

(h) A declaration that the issuance of the said Provisional Lease to the 2nd defendant is unlawful, improper, unconstitutional and therefore null and void;

(i) A Declaration order that the area so included in the said Provisional Lease as claimed by the Plaintiffs as part of their NCR Land, the same be excised out of the area of land under the said provisional lease.

(j) A prohibitory injunction restraining the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants and/or their employees, servants and/or agents from trespassing, clearing, using or occupying the Plaintiffs' said NCR Land;

(k) A mandatory injunction against the 1st, 2nd, 3rd, 4th, 5th, and 6th Defendants and/or their employees, servants and/ or agents to cease operations and remove all structures and their equipment or machineries from the Plaintiffs; said NCR Land forthwith.

[7] In his decision the learned JC made a finding that the defendants have not rebutted the plaintiffs' claim. His Lordship also found, on balance of probabilities, that the plaintiffs' NCR land (totalling 107.8331 hectares) is within the PL Lot 24 granted to the third defendant. This is a finding of fact by the learned JC.

[8] Regarding the size of the NCR land claimed by the plaintiffs, the learned JC was aware of the conflicting sizes of the PL as seen from the evidence of the witnesses. The learned JC addressed this issue in his judgment as follows:

> I am aware that there are 3 conflicting sizes of the said PL Lot 24 adduced in Court. Upon registration on 16th May 2001, the size of the PL Lot 24 was 4000 hectares more or less. At that material time, there was no perimeter survey yet. (refer to pages 1-6 of DBOD-2).
>
> When the Perimeter Survey was completed in 2004 by the licensed surveyor, the size of PL Lot 24 became 4025 hectares which is 25 hectares more than the PL registered in 16th May 2001. Later the Lot 24 was increased to 4,286 hectares when the survey papers were sent to Kuching for approval and issuance of the title document of the said land. See PW1-A, D6, D7 with Appendix A and B respectively.
>
> Learned counsel submits that whatever the size of PL Lot 24, the Delta Pelita have planted oil palm on the Plaintiffs' NCR lands on Plot C and D within PL Lot 24. This is supported by Exhibit P20 which is a Topographical Map 1:50,000 of Nanga Tamin ("Topo Map"). The Topo Map clearly shows at the upper right part of it, that oil palm is planted with oil palm on land owned by "Delta Oil Palm Plantation". The shape

of the area planted with oil palm is similar in shape to the plan delineated in the issue document of title for PL Lot 24 and similar in shape to the Plans in Exhibits D6 and D7. Hence, I am in agreement with the learned counsel for the Plaintiffs that it is reasonable to infer that this is PL Lot 24, whether containing 4000 hectares, 4286 hectares or 4025 hectares.

I am of the view that whether the size of the said Provisional Lease is 4000 hectares, 4286 hectares or 4025 hectares, the Plaintiffs are only claiming their NCR land comprising 107.8331 hectares which have been included in the said Provisional Lease.

Be that as it may, the approval from the State Government to alienate the land was for "4000 hectares more or less". When it was surveyed for the P.L. purposes the land size came up to 4025 acres (see exhibit PW1-C).

When the survey papers were submitted to Kuching somehow this 4025 was further increased to 4268 hectares (see Exhibit PW1-A) that is why I asked parties to address me whether the 4268 hectares approved by the State Authorities was in contravention of the initial approval of "4,000 hectares more or less".

"More or less" is defined as close to, just about, or so, roughly, approximate, to a small degree or extent.

I must say that this is piece of information as to the increase in size to 4,268 only came to light when PW1 was recalled to give evidence on rebuttal.

Unfortunately, PW1 was unable to assist why the land office at Kuching decided to increase the acreage from 4025 hectares to 4268 hectares which is quite considerable and cannot be said to be more or less the approved 4,000 hectares. However counsel for the Plaintiffs did not move to amend their pleadings so as to enable this Court to rule on the legality of the issued title since the area approved was only for 4,000 hectares more or less.

Be that as it may, since the initial approval was for 4,000 hectares more or less by the second Defendant, rightfully the title document issued pursuant to the Sarawak Land Code should be for 4,024 hectares as surveyed and not for 4,268 hectares.

[9] The primary issue decided by the learned JC is whether the plaintiffs had acquired NCR within the PL Lot 24.

[10] The appeal by the first and second defendants is only against the granting of the declarations in para. (h) and (i) of the plaintiffs' claim and the granting of the injunction prayed for by the plaintiffs in para. (j) and (k) of the statement of claim. We produce below the relevant paragraphs of the prayers in the plaintiffs' statement of claim:

(h) A declaration that the issuance of the said Provisional Lease to the 2nd defendant is unlawful, improper, unconstitutional and therefore null and void;

(ii) A Declaration order that the area so included in the said Provisional Lease as claimed by the Plaintiffs as part of their NCR Land, the same be excised out of the area of land under the said provisional lease.

(j) A prohibitory injunction restraining the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants and/or their employees, servants and/ or agents from trespassing, clearing, using or occupying the Plaintiffs' said NCR Land;

(k) A mandatory injunction against the 1st, 2nd, 3rd, 4th, 5th, and 6th Defendants and/or their employees, servants and/or agents to cease operations and remove all structures and their equipment or machineries from the Plaintiffs; said NCR Land forthwith.

[11] The appeal by the third defendant is against the whole of the decision of the learned JC.

Submission By State Legal Officer For The First And Second Defendants In Appeal No. 353

[12] The two declarations - prayer (h) and (i) of the plaintiffs' statement of claim - granted by the learned JC are contradictory in terms. It was further submitted that the proper remedy ought to be an order that, the 107.8331 hectares NCR land be excluded when the provisional lease was issued under s. 28(3) or (4) of the Sarawak Land Code (Cap. 81). Relying on the Federal Court's decision in *Government Of The State Of Negeri Sembilan v. Yap Chong Lan & Ors And Another Case* [1984] 2 CLJ 150; [1984] 1 CLJ (Rep) 144; [1984] 2 MLJ 123, it was argued that where the NCR land could be severed from the provisional lease, this should be done and the declaration to invalidate the provisional lease ought to be refused. At this juncture it is pertinent to note that on being questioned by the court, the learned Legal State Officer Puan Dayang Jamillah Tun Salahuddin who appeared for the first and second defendants conceded that the NCR land claimed by the plaintiffs is within the provisional lease Lot 24.

[13] As for the granting of the injunction against the first and second defendants, it was submitted that the learned JC was wrong. It was argued that s. 29 of the Government Proceedings Act 1956 does not permit the granting of any injunction against the Government. Similarly under s. 54(d) of the Specific Relief Act 1950, no injunction could be granted which would interfere with the public duties of a Government department.

Submission By Counsel For The Third Defendant In Appeal No. 370

[14] Learned counsel for the third defendant, Mr Henry Ling, had filed 33 grounds of appeal and 82 pages of written submission. However some of the grounds in the third defendant's memorandum of appeal overlapped. After careful perusal of the grounds of appeal by the third defendant, we

think that the grounds of appeal can be grouped into four main grounds. These four main grounds also formed the basis of learned counsel's submission before us. Firstly, the plaintiffs have no *locus standi* to bring this suit and the learned JC erred in treating this suit as a representative action. Secondly, the learned JC had not given sufficient judicial appreciation of the facts and evidence in this case in granting the declarations sought by the plaintiffs. Thirdly, the learned JC had erred in holding that the granting of the provisional lease to the third defendant by the first and second defendants is unlawful, improper, unconstitutional and therefore null and void and that the provisional lease had impaired the plaintiffs' NCR land. Fourthly, the learned JC to award special and general damages to the plaintiffs.

Our Decision

[15] As for Appeal No. 353, in the light of the concession by the learned State Legal Officer that the plaintiffs' NCR land is within the provisional lease issued to the third defendant and the finding of fact by the learned JC that 107.8331 hectares of NCR land claimed by the plaintiffs are within the provisional lease for Lot 24, we affirmed the High Court order on this point and ordered that the 107.8331 hectares of NCR land within the provisional lease be surveyed to identify its exact location and size and then be excised from the provisional lease. By doing so the remaining land under the provisional lease not affected by the NCR land will be intact and the third defendant can continue to have quiet and peaceful enjoyment of the provisional lease. Accordingly, we allowed the first and second defendants' appeal in respect of prayer (h) of the plaintiffs' statement of claim and dismissed the appeal in respect of prayer (i) of the same.

[16] With regard to the appeal on the granting of the injunction, we agree with the submission by the learned State Legal Officer that injunction cannot lie against the Government or a Government department to stop them from carrying out their public duties. The effect of s. 29 of the Government Proceedings Act 1956 and s. 54 of the Specific Relief Act 1950 was discussed by this court in *Superintendent of Lands and Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd* [2009] 6 CLJ 751 where it was held as follows:

> (4) Notwithstanding the High Court's discretion to grant an injunction, s. 29 of the GPA does not permit the granting of any injunction against the government. Likewise, s. 54 of the SRA prohibits the grant of an injunction against any Malaysian government department. The words of s. 29(1)(a) of the GPA are quite clear and there is no reason to depart from it. Under s. 29(1)(b) of the GPA, although the court is prohibited from making an order for the recovery of land or the delivery of property in proceedings against the government for the recovery of land or other property, the court may make an order declaring that a plaintiff be entitled to such land

A

> or property. Thus an aggrieved plaintiff, though unable to recover the land is not deprived of certain entitlement, such as compensation. In the instant case, in view of the statutory prohibitions, there was no prospect of the respondent recovering possession of the land from the government. Thus, there was no reason why an injunction should have been granted at all ... .

B

[17] Accordingly we allowed the appeal on this point and set aside the High Court order granting the prohibitory and mandatory injunction against the first and second defendants.

[18] With regard to Appeal No. 370, we agree with the submission by C learned counsel for the third defendant that there is no evidence of special damages before the learned JC to justify the award of such damages. Therefore we set aside the order on special damages ordered by the learned JC.

[19] As for the issue of *locus standi* of the plaintiffs to bring this action D against the defendants as a class action or representative action, we find no merit in the arguments by learned counsel. We have perused the judgment of the learned JC carefully. We observe that His Lordship has meticulously considered the connection of all the natives' witnesses to the NCR land which they claimed to be their NCR. Though the learned JC did not directly E considered the issue of *locus standi*, we are of the view that the finding of fact by the learned JC of the connection of the natives witnesses that gave evidence to the land which they claimed as their NCR is sufficient to give the plaintiffs *locus standi* to bring this action. For example, PW3 gave evidence that his ancestors had settled in the area of Sungei Baoh Chelum and F Sungei Semaram before 1 January 1958. Since then they have been cultivating and farming the land. PW3 is the first plaintiff. He was born in 1944 in the longhouse now known as Rumah Meriak, Batang Oya Mukah Sarawak. PW4 who gave evidence is the first cousin of PW3 and PW6. He also testified to the history of his ancestors and as to how his ancestors built their longhouse and created their temudas on the land which they claimed G to be their NCR. The other witness that gave evidence for the plaintiffs was PW8 who is the present tuai rumah (headman) of the longhouse of the plaintiffs. PW8 testified that his temuda land at Sungei Baoh Chelum and Sungei Semaram is adjoining to that of PW3. The learned JC accepted the evidence of these witnesses when he said in his judgment:

H

> Based on the evidence of PW3, PW6, PW4 and PW8 I am satisfied that the plaintiffs have created an NCR measuring of 107.8331 hectares which have been included in the said PL Lot 24. I also believe their testimonies that this NCR were created prior to 1 January 1958.

I

[20] We have no reason to depart from the learned JC's finding. He had the advantage of seeing and hearing the witnesses when they gave evidence before him. Thus, His Lordship is in a better position to evaluate the truthfulness, (hence the credibility of the witnesses), of the testimonies given by the witnesses.

[21] With regard to the other grounds of appeal by the third defendant which relate to the judicial appreciation of evidence by the learned JC and the ruling that the issuance of the provisional lease to the third defendant was unlawful, null and void because it impaired the plaintiffs' NCR, we are of the view that these grounds are no longer tenable in the light of our decision in Appeal No. 353 as stated above. We therefore affirmed the rest of the orders made by the learned JC of the High Court.

[22] For the above reasons, we made the following orders:

(i) with regard to Appeal No. 353, we allowed this appeal in respect of prayer (h) of the plaintiffs' statement of claim and dismissed the appeal against prayer (i) of the same. We also allowed the appeal against the granting of the injunction under prayers (j) and (k) of the plaintiffs' statement of claim and set aside the High Court Order.

(ii) with regard to Appeal No. 370, we unanimously allowed the appeals partially, in that the order of assessment on special damages is set aside; and we affirmed the other orders made by the learned JC.